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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

BRIAN JAMES CLARK,

Defendant and Appellant.

A142142

(Humboldt County
Super. Ct. No. CR1304465)

In this appeal, appellant Clark challenges the amount of restitution imposed by the trial court. Specifically, he focuses on the sum of noneconomic restitution the court assessed for his criminal behavior. He raises challenges based on *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), equal protection, and the right to a jury trial. We have reviewed each of the claims and find them without merit. We affirm the judgment.

STATEMENT OF THE CASE

A felony complaint was filed by the District Attorney of Humboldt County on October 2, 2013. It charged appellant with two counts of lewd and lascivious conduct upon a child under 14 years of age, a violation of Penal Code section 288, subdivision (a)¹ (counts 1 & 2). The complaint also alleged in count 3 a misdemeanor charge of indecent exposure (§ 314, subd. (1)), and in count 4 one count of misdemeanor annoying

¹ Unless otherwise stated all statutory references hereafter are to the California Penal Code.

or molesting a child under the age of 18 (§ 647.6, subd. (a)(1)). Appellant pled not guilty to the charges.

On February 26, 2014, appellant entered a no contest plea to count 1 and he voluntarily waived his rights pursuant to *In re Tahl* (1969) 1 Cal.3d 122 and *Boykin v. Alabama* (1969) 395 U.S. 238. The district attorney dismissed the remaining counts in light of the plea.

On March 12, 2014, the victim in the case moved for restitution and requested the opportunity to file documents under seal supporting her restitution request. That motion was granted on March 26, 2014, pursuant to California Rules of Court, rules 2.550 and 2.551.

The sentencing in the case took place on April 29, 2014. The court placed appellant on formal probation for three years with several conditions, including a sentence of 180 days in the county jail, with credits. On the same day, the court conducted a restitution hearing in the case. Appellant filed written objections to the victim's request for \$632,947 in restitution covering economic and noneconomic damages. This was after reviewing the sealed documents filed by the victim in the case.

On June 4, 2014, the trial court issued its restitution order. He directed the appellant to compensate the victim Jane Doe in the sum of \$219,347, with 10 percent interest per year from the sentencing date. He also ordered compensation to the private attorney hired by Jane Doe in the amount of \$76,528.55, based on Doe's contingent fee contract and collection costs.

Appellant filed a timely appeal.

STATEMENT OF FACTS

Since there was no trial, the facts we rely on here are derived from the probation report submitted to the court. The evidence indicates on or about September 17, 2013, Jane Doe, age 14, reported to her school counselor that her uncle, the appellant, had been

molesting her since she was five years old. Her legal guardian consented to a CAST interview on September 20, 2013, regarding these allegations.

Jane Doe indicated the incidents began when she was five and appellant would unbutton his pants and place the victim's hand on his erect penis while the two were on the couch. Eventually, appellant would masturbate in front of Jane Doe on a very frequent basis. The location for these acts would be in her living room, in the hot tub, or while the two were driving in a car.

Appellant was married to Jane Doe's biological aunt. The victim eventually lived with the couple during several months in 2013. Jane Doe would notice appellant watching her as she showered at the home. In one instance appellant wanted to feel how soft her "boobs" were. He would also send Facebook messages about sex to her.

On September 24, 2013, Jane Doe called appellant on a cell phone while she was at the Arcata Police Department. The conversation was recorded by police. Jane Doe challenged appellant regarding his behavior and its inappropriate nature. Appellant acknowledged he had a compulsive disorder that triggered his physical conduct with the victim. He believed what he did was wrong. He admitted to her on the call he had masturbated in front of her. When Jane Doe asked appellant why he engaged in such conduct, he remarked, "You're like my wife. You're a younger version of my wife." When Jane asked appellant if he had done this to other girls, he stated he had a sexual addiction and compulsive disorder. He told her he needed counseling and that his wife was trying to have appellant seek counseling.

The police conducted an interview of appellant on September 27, 2013. First he stated the victim was simply a "drama queen" and denied the behavior. However, once the tape of the above phone conversation was played to appellant he admitted to certain conduct. He advised the police he had masturbated in the presence of Jane Doe three times in his car and 10 times in the living room of the home. He denied any incidents in

the hot tub. He also confirmed that when Jane Doe was five, he touched her breasts and placed her hand on his penis.

Appellant indicated during this interview he was attracted to Jane Doe because she now was the same age of his wife when they first began dating. He finished his interview with the police by writing a letter of apology to Jane Doe for his behavior.

He was then arrested by police.

On the sentencing date, the trial court conducted a restitution hearing attended by appellant, his counsel, Doe's private counsel, Patrik Griego, and a member of the staff of the district attorney. Before the hearing, Griego filed with the court, under seal, Jane Doe's motion for restitution. Griego's two-page declaration indicates Jane Doe's guardian and Griego had entered into a contingency fee contract providing an attorney fee of 33-1/3 percent. His firm had advanced costs of \$3,412.88, primarily for the services of Robert Soper, M.D., for an evaluation of Doe. Griego also stated Doe's life expectancy is 68.2 years, based on CACI Judicial Council Life Expectancy tables. He provided examples from four civil cases involving particular jury awards in molestation cases. The Griego declaration provides no details on the specific hours spent by his firm on the case or a reasonable calculation of future hours of work for the client. Attorney Griego represented Doe at the hearing but did not testify regarding the contingency fee contract and the billable hours, actual and anticipated, involving his firm in the case. The fee contract was not submitted as an exhibit. No civil lawsuit was pending at the time of the restitution hearing.

A declaration by Dr. Soper was also filed under seal. He indicated Doe would need psychiatric intervention of various forms "over a two year span and . . . intermittent sessions throughout her life." However, his declaration omitted detailed discussion on the nature of this treatment. Soper did not testify at the hearing. A declaration by John Van der Werff, D.D.S., was also filed. The Van der Werff statement addressed dental

issues attributed to Doe's reaction to her molestation by appellant. Van der Werff did not testify at the hearing.

Appellant's counsel presented a memo on the restitution issue, contending Doe's varied life experiences, not just appellant's acts, contributed to certain conclusions presented in the declarations submitted by Soper and Van der Werff. However, appellant did not testify or present evidence challenging the financial claims presented by Doe's counsel. Appellant specifically presented no contrary witnesses or declarations on Doe's mental health needs or the fees claimed by her civil counsel.

The district attorney presented no other evidence at the hearing, but did concur with the claims made by Doe's private counsel.

After the restitution hearing, the trial court ordered appellant to pay Jane Doe restitution in the amount of \$219,347, along with 10 percent interest per year from the date of sentencing. He also ordered attorney fees and collection costs of \$76,528.55. The restitution sum included \$186,400 in noneconomic losses of the victim, pursuant to section 1202.4, subdivision (f)(3)(F). Specifically, the court stated: "The Court has considered the pleadings, the documents submitted in support of, and in opposition to, the motion [Doe's sealed request for restitution], and the arguments of counsel, and makes the following findings and orders:

"1. Defendant Brian James Clark, on February 26, 2014, pled no contest to a violation of Penal Code §288(a), commission of a lewd act upon a child. While the plea was to conduct occurring between January 1, 2004, through March 1, 2005, the acts of child molestation occurred over a period of some ten years commencing when the child was four or five years old and continuing until age fourteen when she made a report against her uncle (defendant herein) to a counselor. While certainly despicable and disturbing, defendant's lewd acts (mutual fondling, masturbation in the presence of the child, and peeping) did not include sexual penetration, oral copulation, or penetration with a foreign object.

“2. Penal Code section 1202.4 requires (a) full restitution (b) for economic losses determined by the Court. Penal Code section 1202.4(a)(1), (f)(3). Medical expenses are a proper item of restitution [Penal Code Section 1202.4(f)(3)(B)] and include future expenses. People v. Phelps (1996) 41 Cal.App.4th 946, 949-951. Victims also have a right to restitution for mental health counseling expenses. Penal Code section 1202.4(f)(3)(C).

“3. Penal Code Section 1202.4(f)(3)(H) mandates restitution for actual and reasonable attorneys’ fees and other costs of collection accrued by a private entity on behalf of the victim. Only those attorneys’ fees attributable to the victim’s recovery of economic damages are allowed under Penal Code Section 1202.4(f)(3)(H). The victim, however, is entitled to full reimbursement for attorneys’ fees incurred to recover both economic and noneconomic losses when the fees cannot be reasonably divided. People v. Fulton (2003) 109 Cal.App.4th 876, 882-885. The Court finds the fees cannot be reasonably divided under the facts and circumstances of this matter.

“4. Penal Code section 1202.4(f)(3)(F) provides for recovery of noneconomic losses, including, but not limited to, psychological harm, caused by a violation of Penal Code section 288 (lewd act on child or dependent adult). Noneconomic damages are subjective, nonmonetary losses, including, but not limited to, pain, mental suffering, and emotional distress. Civil Code Section 1431.2(b)(2). See People v. Smith (2011) 198 Cal.App.4th 415, 430-436 (Penal Code Section 1202.4(f)(3)(F) exception to general rule that restitution orders are limited to victim’s economic damages does not violate child molester’s equal protection rights).

“5. Victim Jane Doe is awarded restitution of \$32,947.00 for past and future medical, dental and counseling expenses, consisting of the following:

“(a) \$3,000.00 for past medical/counseling expenses;

“(b) \$2,322.00 for past dental expenses;

“(c) \$24,625.00 for future medical/counseling expenses;

“(d) \$3,000.00 for future medical expenses.

“6. Victim Jane Doe shall recover general (noneconomic) damages in the total sum of \$186,400.00 consisting of the following:

“(a) Past damages of \$50,000.00 calculated at \$5,000.00 per year for ten years; and

“(b) Future damages of \$136,400.00 calculated at \$2,000.00 per year for Jane Doe’s life expectancy of 68.2 years.

“7. Victim Jane Doe shall recover attorneys’ fees of \$73,115.67 (1/3 of the \$219,347.00 total of general and special damages), together with \$3,412.88 in costs, for a total amount of \$76,528.55 for attorneys’ fees and costs.

“8. Defendant is hereby ordered to pay victim Jane Doe restitution in the amount of \$219,347.00 plus interest at 10 percent per year from the date of sentencing (April 29, 2014), plus attorneys’ fees and collection costs of \$76,528.55.” (Emphasis in original.)

DISCUSSION

Restitution has been recognized as a consequence of criminal conduct in California for a substantial time. In 1982, the voters of this state passed Proposition 8, which declared a constitutional right to restitution. “It is the unequivocal intention of the People of the State of California that all persons who suffer losses as a result of criminal activity shall have the right to seek and secure restitution from the persons convicted of the crimes causing the losses they suffer.” (Cal. Const., art. I, § 28, subd. (b)(13)(A).) Also, “[r]estitution shall be ordered from the convicted wrongdoer in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss.” (Cal. Const., art. I, § 28, subd. (b)(13)(B).) Additionally, our Legislature has stated: “It is the intent of the Legislature that a victim of crime who incurs an economic loss as a result of the commission of a crime shall receive restitution directly from a defendant convicted of that crime.” (§ 1202.4, subd. (a)(1).) While restitution at one time was limited to the sum of \$10,000 (former Gov. Code, § 13967, subd. (c)), the relevant statute now requires

“full restitution” with no top on the proper amount. (§ 1202.4, subds. (f) & (g).)

Important in this instance is the legislative recognition that in cases involving child molestation cases, the restitution award includes noneconomic losses, including psychological harm. (§ 1202.4, subd. (f)(3)(F); *People v. Smith* (2011) 198 Cal.App.4th 415, 431 (*Smith*).)

In *People v. Brasure* (2008) 42 Cal.4th 1037, 1074, the court determined section 1202.4, subdivision (f) permitted compensation to a murder victim’s mother for her economic losses caused by psychological injury. The statute applies to every case in which the victim suffered economic loss resulting from the accuser’s conduct, and does not distinguish between losses proved by physical injury and psychological consequences.

Included within the scope of restitution are “actual and reasonable” attorney fees and collection costs accrued by a private entity on the victim’s behalf to collect restitution. (§ 1202.4, subd. (f)(3)(H)); *People v. Maheshwari* (2003) 107 Cal.App.4th 1406, 1409.) Yet, reviewing courts are obligated to determine the reasonableness of any fee recovery, reviewing the evidence on this. The Legislature has permitted “*actual* and reasonable” fees (§ 1202.4, subd. (f)(3)(H), italics added), suggesting a judicial scrutiny consistent with *criminal* restitution purposes. We are not dealing with private civil arrangements. (Compare *People v. Millard* (2009) 175 Cal.App.4th 7, 31 [lodestar analysis used] and *People v. Taylor* (2011) 197 Cal.App.4th 757, 760 [contingent fee contract allowed].)

The problem here is the failure by appellant’s counsel to challenge the fee recovery at the restitution hearing. In papers filed before the hearing, appellant contended the psychiatric problems of Jane Doe were partially caused by her upbringing before Clark was involved in her life—her mother used drugs during pregnancy and related problems. Counsel said nothing challenging the professional relationship between Jane Doe and her private attorney. There was no suggestion further review was needed

before awarding attorney fees, or a contingent fee award would be excessive when compared to the purposes of attorney fees and criminal restitution. Indeed, appellant's trial counsel's restitution memorandum only asked the trial court to consider alternative factors in the amount of future medical psychotherapy for Jane Doe.

At the restitution hearing held on April 29, 2014, appellant again made no challenge of the requested attorney fee and costs. The particular claim was simply not discussed. Appellant did argue the medical reports failed to consider other factors affecting the mental health of Jane Doe. But that was the exclusive focus of his argument. On that point, the court did substantially reduce the claimed restitution amount from \$632,947 to \$219,347. But the silence on the subject of the attorney fees amounted to a waiver for purposes of appellate review.

Based on this record, we conclude appellant waived any objection to the attorney fee restitution award here. Matters outside the record are generally not reviewable. (*People v. Gardner* (1969) 71 Cal.2d 843, 849; *People v. Merriam* (1967) 66 Cal.2d 390, 396–397.) We note the trial court did significantly reduce the damage claim of Jane Doe after reviewing appellant's contentions on that issue. The trial court was not asked to negate the contingent fee contract here, hence we will not disturb that specific award.

1. Restitution Proceedings and the *Apprendi* Rule.

Appellant challenges this order because it directed him to pay Jane Doe a particular amount of noneconomic damages pursuant to section 1202.4, subdivision (f)(3)(F)). He contends this damage determination should have been made by a jury under the Sixth Amendment and not by the court at the restitution hearing. He relies on *Apprendi, supra*, 530 U.S. 466 and *Southern Union Co. v. United States* (2012) __U.S. ___, 132 S.Ct. 2344 (*Southern Union*). We conclude, along with numerous other courts, these Supreme Court decisions do not apply to the issue of restitution presented in this case.

The issue in *Apprendi, supra*, 530 U.S. 466 involved a sentencing under the New Jersey hate crime statute, which authorized an extended term sentence when it was proved that a particular crime was motivated by intent to intimidate a person or group because of specific characteristics, i.e., a hate crime enhancement. Under the state statute, the hate motivation issue was to be tried by the court, not a jury, and the standard of proof was preponderance of the evidence. (*Id.* at pp. 468–469.) The trial court found the hate crime circumstances applied to one of the crimes of which defendant was convicted and sentenced him to an increased prison term. The enhanced punishment was beyond the otherwise normal range for that crime. (*Id.* at pp. 470–471.)

In reversing the sentence, the majority focused on the question whether the judicial finding there exposed the defendant to a greater punishment than that *authorized* by the offense charged and triable to a jury. (*Apprendi, supra*, 530 U.S. at p. 474.) All crimes and enhancements other than a prior conviction must be proven beyond a reasonable doubt. (*Id.* at p. 490.) The court concluded it was unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. (*Ibid.*) It is equally clear that such facts must be established by proof beyond a reasonable doubt. (*Ibid.*)

Apprendi applies when the court is allowed to impose punishment beyond the finding reflected in the jury's *verdict*. It is also violated when the proof of that finding is below the proof beyond a reasonable doubt standard.

In *Southern Union, supra*, 132 S.Ct. 2344, a majority of the court applied *Apprendi* to criminal fines. In that case, the defendant was charged with criminal environmental crimes. While the indictment alleged the pollution by defendant took place between September 19, 2002 and October 19, 2004, the jury verdict found the corporation guilty of a one-count charge covering the two-year period. Each statutory violation of the offense had a fine of \$50,000 per day. Since the jury made no finding in its verdict on the number of days Southern Union had violated the statute, the defendant

argued it could only pay a criminal fine of \$50,000. The trial court, instead, determined the span of time covered a 762-day violation of the statute and therefore multiplied the daily fine by the number of alleged days to create a total criminal fine of \$38.1 million. (*Id.* at p. 2349.)

The court held this total fine was a violation of the right to a jury trial. The decision by the trial court to attribute defendant's conduct to a span of 762 days without that finding by the jury was improper. Instead of the maximum fine of \$50,000 on the one count, the trial court imposed a fine 762 times greater than the fine for violating what the jury determined, a one-count criminal conviction. (*Southern Union, supra*, 132 S. Ct. at pp. 2353–2354.) This is obvious *Apprendi* error.

In our case, appellant admitted to lewd conduct with Jane Doe and acknowledged this conduct had taken place over a period of years. Appellant makes no challenge to his probationary sentence or any fines imposed by the court based on the *Apprendi* doctrine. He only challenges the amount of restitution, and focuses on the specific noneconomic damages finding.

While the Supreme Court has never concluded restitution awards in criminal cases are jury, as opposed to court, determinations, the fact remains these awards are outside the scope of *Apprendi, supra*, 530 U.S. 466. In California, a restitution order is without a maximum limit. The determination only seeks to make the victim whole for the economic consequences of her injury, not to punish the accused. The jury verdict triggers a judicial assessment of the full financial impact of the verdict's finding. This award is not traditionally viewed as punishment to the accused; it is seen as recovery by the victim of crime for injury inflicted—the cost of making the victim whole for what has occurred by criminal agency. Civil trials are not controlled by the Sixth Amendment and neither are criminal restitution hearings seeking to accomplish the same result. Furthermore, the burden of proof for restitution in either setting is by a preponderance of the evidence, not beyond a reasonable doubt as criminal punishment requires.

On several occasions, California appellate courts have rejected the application of *Apprendi* and *Southern Union* when deciding issues of restitution. In *People v. Chappelone* (2010) 183 Cal.App.4th 1159, Division Two of this district criticized several features of the restitution award by the trial court in a case involving theft from a Target store. One feature of the award approved by the Court of Appeal was the decision by the trial court to conduct the evidentiary hearing without a jury. The panel affirmed the notion that “ ‘ “the primary purpose of victim restitution is to provide monetary compensation to an individual injured by crime,” ’ a collection procedure that is civil in nature.” (*Id.* at p. 1184.) While it is correct to note there are secondary features of restitution, such as deterring future criminal conduct, the essence of restitution is to make the victim whole and it is not to increase punishment to the accused.² Therefore, on this issue, “we conclude defendants’ argument is without merit.” (*Ibid.*)

Even when the court deals with noneconomic damages in the restitution setting, such as in this case, the accused is not entitled to a jury trial under either the federal or California constitution. (*Smith, supra*, 198 Cal.App.4th at p. 433.) This is because restitution in a criminal proceeding is “indistinguishable” from noneconomic damages in the civil trial context. (*Ibid.*) The subjective nature of noneconomic damages does not change matters. (*Ibid.*)

Another case taking the same stance is *People v. Pangan* (2013) 213 Cal.App.4th 574, where the Fourth District also addressed the cases appellant relies on here, *Apprendi, supra*, 530 U.S. 466, and *Southern Union, supra*, 132 S.Ct. 2344. These two rulings have no application to direct victim restitution “because direct victim restitution is not a criminal penalty.” (*Pangan*, at p. 585.) Restitution under our Penal Code does not constitute increased punishment for a crime and section 1202.4, subdivision (a)(3)(B)

² The opinion cites decisions by *every* federal circuit court *except* the Fourth and District of Columbia that has agreed *Apprendi* and its progeny do not apply to restitution hearings. (*People v. Chappelone, supra*, 183 Cal.App.4th at p. 1184.)

characterizes such recovery as akin to a “civil judgment.” (*Pangan*, at p. 585.)

Remanding the case to the trial court because of another issue, the court stated, “[O]n remand there will be no *Southern Union–Apprendi* . . . right to a jury trial.” (*Id.* at p. 586.)

Therefore, the attempt by appellant to extend *Apprendi* to the restitution context in this case is without merit.

2. Restitution and Equal Protection.

The Legislature has decided in the context of child molestation cases for “felony violations of Section 288,” that restitution is appropriate for “noneconomic losses, including, but not limited to, psychological harm.” (§ 1202.4, subd. (f)(3)(F).) Other victims of crime may recover economic losses alone under criminal restitution hearings. Appellant contends this is a violation of equal protection. He relies primarily on *People v. Hofsheier* (2006) 37 Cal.4th 1185 (*Hofsheier*).

Our Supreme Court overruled *Hofsheier* in *Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 879, rehearing denied April 22, 2015. In that case a defendant convicted of felony nonforcible oral copulation filed a petition for writ of mandate to be relieved of his sex offender registration requirements. The Supreme Court held registration requirements were proper there and do not violate equal protection. (*Id.* at p. 875.) As the majority observed, “The Legislature has long demonstrated a strong resolve to protect children from sexually inappropriate conduct of all kinds, including sexual intercourse and oral copulation. Depending on the nature of the conduct and the ages of the offender and the minor victim, conviction of a sexual contact crime may subject the offender to incarceration, civil penalties, and other consequences.” (*Id.* at p. 874.) Distinguishing mandatory registration for those convicted of nonforcible oral copulation offenses from discretionary registration for those convicted of nonforcible unlawful sexual intercourse is not a violation of equal protection. *Hofsheier* involved

“faulty” constitutional analysis and therefore the decision “was in error” and overruled. (*Id.* at p. 875.)

We find the Legislature has considerable latitude to decide noneconomic damages can be awarded to child victims of felonious conduct violating section 288. These offenses are among the most serious and long-lasting crimes to child victims. Focusing on the conduct here, Jane Doe sustained regular abuse by a family member over a period of years. Uncontradicted expert declarations support the mental health needs here. Historically identifying children as a particular group of victims for enhanced protections, including restitution, is not irrational or constitutionally suspect. “ ‘[W]hen conducting rational basis review, we must accept any gross generalizations and rough accommodations that the Legislature seems to have made.’ [Citation.] ‘A classification is not arbitrary or irrational simply because there is an “imperfect fit between means and ends.” ’ ” (*Johnson v. Department of Justice, supra*, 60 Cal.4th at p. 887.) Finally, “[a]t bottom, the Legislature is afforded considerable latitude in defining and setting the consequences of criminal offenses.” (*Ibid.*)

Because of the potential long-term needs of victims like Jane Doe and the desire to make whole a person who has suffered serious mental trauma from a family member, a statute permitting recovery of noneconomic costs even in the future is a rational decision by our state Legislature. No more is needed.

3. The Award for Noneconomic Damages and Appellant’s Right to a Jury Trial under the California Constitution.

In this case, appellant entered a plea to count 1 of the information and waived his right to a jury trial. He was properly advised before doing so and had the benefit of counsel. An award of restitution was anticipated here as a result of the plea. Appellant indeed filed a memorandum dealing with the issue of direct victim restitution. He did not challenge the validity of direct victim restitution or the legal propriety of noneconomic damages in this case. He never requested a jury trial on the issue of restitution.

In light of section 1202.4, subdivision (f), and *Smith, supra*, 198 Cal.App.4th 415, the award was a valid consequence of the no contest plea and a victim's right to restitution. Furthermore, since appellant made no request for a jury trial on the matter at the sentencing or post-plea before the trial court, the issue is waived now. (*People v. Scott* (1994) 9 Cal.4th 331, 353.)

4. The Trial Court's Method of Calculating Noneconomic Damages.

Appellant argues the trial court abused its discretion when it awarded Jane Doe \$186,400 in noneconomic damages because the court did not use a rational method of calculation. An order of restitution is reviewed for an abuse of discretion. (*Smith, supra*, 198 Cal.App.4th at p. 435; *People v. Chappelone, supra*, 183 Cal.App.4th at p. 1173.) “ “ “While it is not required to make an order in keeping with the exact amount of loss, the trial court must use a rational method that could reasonably be said to make the victim whole, and may not make an order that is arbitrary or capricious.” ’ ” (*People v. Holmberg* (2011) 195 Cal.App.4th 1310, 1320.)

In *Smith, supra*, 198 Cal.App.4th 415, the Court of Appeal specifically addressed the award of noneconomic damages in a child molestation case. The court noted “[n]oneconomic damages are ‘subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, . . . injury to reputation and humiliation.’ ” (*Id.* at p. 431, citing Civ. Code, § 1431.2, subd. (b)(2).) In *Smith*, the victim requested \$750,000 in noneconomic damages and attached to her pleading various articles indicating jury verdicts in child molest cases awarding \$8 million and \$1.7 million for such victims. (*Smith*, at p. 432.) The trial court in *Smith* did award the full sum of \$750,000, observing the victim was molested over a 15-year period, from the ages of eight to 23. The court *multiplied* the sum of \$50,00 per year by 15 to reach the figure awarded. (*Id.* at p. 433.) The Court of Appeal found this process by the trial court did not shock the conscience of the court. There was no abuse of discretion, therefore. (*Id.* at pp. 436–437.)

In our case, the court was asked by Jane Doe's counsel to award noneconomic damages in the sum of \$632,947. Appellant's counsel objected to that figure. The trial court indicated the appellant pled no contest to acts covering a period between January 1, 2004, and March 1, 2005. However, the course of molestation actually involved in the case was over a 10-year period, from the child's age of four or five to the age of 14. The trial judge articulated in his order the noneconomic damage award at paragraph 6 of the order. Specifically, the court calculated the past damages to be \$50,000 at \$5,000 per year over 10 years, and future damages of \$136,400 at \$2,000 per year over the life of Jane Doe. This assessment was well below the amount Jane Doe requested and was based on the professional calculation of Jane Doe's mental health experts, whose reports were part of the record. Furthermore, the trial court had the legal reasoning of the *Smith* opinion in this matter. (*Smith, supra*, 198 Cal.App.4th 415.)

After reviewing the hearing in this matter and the court's order, we conclude there was a rational basis for the award and no abuse of discretion is presented here. (*People v. Holmberg, supra*, 195 Cal.App.4th at p. 1320; *People v. Millard, supra*, 175 Cal.App.4th at p. 26.)

Finally, we are asked to assess the noneconomic award here based on the fact the court considered such damages beyond the temporal period covered in count 1 of the information. While appellant pled no contest to events that took place from January 1, 2004, through March 1, 2005, the record reflects the pattern of behavior involved in this sordid case covered a period of approximately 10 years. Also, the emotional consequence to Jane Doe from such lewd conduct has imposed a lasting effect on her life, according to expert analysis in this record.

We are dealing with noneconomic damage, even if limited by count 1, that was inflicted over a period of 14 months on a regular basis. Furthermore, the pattern of conduct continued for several years after the dates alleged in count 1. The pain and suffering Jane Doe experienced did not terminate on March 1, 2005. Instead they

continue to this day. As the court in *Smith* observed, “[T]here is no credible argument, especially on the facts of this case, that Doe’s psychological harm ended when she was 15 years old. Accordingly, the court did not abuse its discretion.” (*Smith, supra*, 198 Cal.App.4th at p. 437.)

Likewise, we cannot conclude the trial court was incorrect when it concluded Jane Doe continued to suffer, and still suffers, from the criminal consequences of felonious behavior by appellant even as a result of the crime alleged in count 1 to which he pled no contest. These are subjective injuries—noneconomic damage—and the award is legally sustained.

DISPOSITION

The judgment is affirmed.

DONDERO, J.

We concur:

HUMES, P.J.

BANKE, J.